

BEFORE THE BOARD OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR
RESERVATION OF WATER NO. 12334-03-r
BY THE UNITED STATES BUREAU OF LAND
MANAGEMENT

)
) FINDINGS OF FACT AND CON-
) CLUSIONS OF LAW OF APPLI-
) CATION NO. 12334-03-r
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The above-entitled matter came on regularly for hearing starting on or about September 21, 1977, in Billings, Montana, before the Montana Board of Natural Resources and Conservation and its duly appointed Hearing Examiner, James Driscoll. The Applicant appeared by and through its counsel of record, Thomas Gai. The Montana Department of Natural Resources and Conservation appeared by and through its counsel of record, Richard Gordon. The Montana Department of Health and Environmental Sciences appeared by and through its counsel of record, Mona Jamison. The Montana Department of Fish and Game appeared by and through its counsel of record, F. Woodside Wright and Clayton Herron. The fourteen applicant conservation districts appeared by and through their counsel of record, Gary Spaeth. Utah International, Inc., appeared by and through its counsel of record, Urban Roth. Intake Water Company appeared by and through its counsel of record, Henry Loble. Witnesses were duly sworn, and oral and documentary evidence was introduced.

The Board, having read and fully considered the complete record, makes the following Findings of Fact and Conclusions of Law relating to the U.S. Bureau of Land Management, Application No. 12334-03-r:

FINDINGS OF FACT

1. The U.S. Bureau of Land Management has applied for a reservation of 1,098 acre-feet of water per year (af/y) with an average diversionary flow rate of 4.60 cubic feet per second (cfs) from the Powder River to be used to irrigate 549 acres. Water would be diverted between May 15 and September 15. In order to divert 1,098 acre-feet during this period, a continuous diversion of the requested 4.60 cfs would be necessary (U.S. Bureau of Land Management, Application No. 12334-03-r, p. 2).

Findings Related to the Purpose of the Reservation (89-890(3)(a)).

2. The purpose of this reservation is to ensure that water will be available for the expected expansion of irrigation on federal lands by the U.S. Bureau of Land Management (U.S. Bureau of Land Management, Application No. 12334-03-r, p. 1).

3. It is established to the satisfaction of the Board that a purpose of the reservation has been shown (Finding 2).

Findings Related to the Need for the Reservation (89-890(3)(b)).

4. Regulations and U.S. Bureau of Land Management policy covering the authorization of more intensive agricultural management of the public lands under the 1976 Federal Land Policy and Management Act have yet to be developed. Funds needed to develop the lands described in the Application will not be available at least until after such regulations are developed (Tr. Vol. 19, following p. 146, Testimony of Newman C. Whittington, p. 3).

5. No water would be put to a beneficial use before 1990 (U.S. Bureau of Land Management, Application No. 12334-03-r).

6. The Applicant does not know when all of any reservation that might be granted would be put to a beneficial use (Tr. Vol. 19, Cross of Whittington, p. 158).

7. It is possible that water reserved for this application would never be put to a beneficial use (Tr. Vol. 19, Cross of Whittington, p. 158).

8. The need for the reservation is speculative and is not supported by sufficient evidence.

9. It has not been established to the satisfaction of the Board that the Applicant has shown that there is a need for this reservation (Findings 4 through 10).

Findings Related to the Amount of Water Necessary for the Purpose of the Reservation (89-890(3)(c)).

10. No significant additional irrigation development can occur in the Powder River Subbasin unless storage is developed and made available to irrigators at a price they can afford (Draft EIS, Vol. II, p. 248; Finding 1).

11. The Applicant has no plans for the provision of such needed storage in the Powder River Subbasin.

12. The potential for development of additional storage in the Powder River Subbasin is uncertain, and it is unlikely that any future storage that may be built would provide irrigation water at a cost irrigators could afford (Tr. Vol. 32, following p. 86, Testimony of Phil Gibbs, pp. 13 through 18; Tr. Vol. 32, following p. 27, Testimony of Olin Kalmbach, pp. 16 through 18).

13. No reservation for full-service irrigation can be granted for water from the Powder River because no water is currently available for such irrigation and because it has not been shown that water sufficiently inexpensive for full service irrigation will ever be available from the Powder River (Findings 10 through 12).

14. It has not been established to the satisfaction of the Board that any amount of water is necessary for the purpose of a reservation for which there is no need and for which development would be impossible without storage, when

such storage is neither available nor proposed to be made available (Findings 9 through 13).

Findings Related to the Public Interest (89-890(3)(d)).

15. It has not been established to the satisfaction of the Board that it is in the public interest to grant a reservation for which there is no need and for which no water should, or can, be reserved (Findings 9 through 14).

CONCLUSIONS OF LAW

1. Chapter 8, Title 89, R.C.M. 1947, and in particular, Section 89-890, R.C.M. 1947, authorize the adoption by the Montana Board of Natural Resources and Conservation of orders reserving water to qualified applicants for reservation of water.

2. If ordered adopted, a reservation must be ordered adopted in accordance with Chapter 8, Title 89, R.C.M. 1947, and any rules adopted thereunder.

3. The Applicant, the U.S. Bureau of Land Management, is an agency of the United States and as such is entitled to apply to reserve waters within the State of Montana in accordance with Section 89-890, R.C.M. 1947, and any rules adopted thereunder.

4. All pertinent statutes and rules of the State of Montana have been adhered to in the review of this reservation application, both by the Montana Department of Natural Resources and Conservation and by the Montana Board of Natural Resources and Conservation.

5. Based upon the above Findings of Fact, a pertinent criterion for the adoption of an order reserving water as delineated in Section 89-890(3)(b), R.C.M. 1947, has not been met, to wit: it has not been established to the satisfaction of the Board that need has been shown for the reservation.

6. Based upon the above Findings of Fact, a pertinent criterion for the adoption of an order reserving water as delineated at Section 89-890(3)(c), R.C.M.

1947, has not been met, to wit: it has not been established to the satisfaction of the Board that any water should be reserved for this application.

7. Based upon the above Findings of Fact, a pertinent criterion for the adoption of an order reserving water as delineated in Section 89-890(3)(d), R.C.M. 1947, has not been met, to wit: it has not been established to the satisfaction of the Board that the reservation is in the public interest.

8. Nothing found herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything found herein have bearing on the status of claimed water rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.